STRAITS SETTLEMENTS REPORTS.

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[ORIGINAL CIVIL JURISDICTION]
TERRELL, Ag. C.J.
September 27, 1937.

DAISY AROOZOO (f) AND OTHERS

v.

AMELIA AROOZOO AND OTHERS

[SINGAPORE SUIT No. 993 of 1933].

Account action—falsifications—position of trustee setting up title adverse to interests of his cestui-que-trustent.

The first defendant was prior to the 30th May, 1930 the sole trustee of the estate of Elizabeth Surin deceased. By deed dated the 30th May, 1930 she appointed the second defendant to be a new trustee of the estate to act jointly with her and the second defendant accepted the appointment and acted in the trust. In an action an order was made against both defendants for filing of accounts on the footing of wilful default. Accounts were filed by the first defendant on the 5th December, 1934 and by the second defendant on the 8th March, 1935. The second defendant filed falsifications against the first defendant's accounts and sought to shew before the Registrar that certain properties which had been included in the first defendant's accounts as forming part of the estate of Elizabeth Surin deceased in reality never belonged to that estate but belonged to the estate of Jonathan Surin deceased.

Held, that as the second defendant had accepted the appointment as trustee and as he had acted in the trusts of the will and as the property had actually been vested in him and the first defendant to be held upon such trusts he could not be allowed to falsify such accounts for the purpose of setting up the adverse title of a third party against his own beneficiaries for whom he was an express trustee. Although he was such an express trustee of the properties, his only object in filing the falsifications was to endeavour to show that there was no property subject to the trust and by this means escape the consequences of his breach of trust and he was not allowed to give evidence to impeach the title of his own beneficiaries.

SUMMONS.

Hoalim for plaintiffs.

Seth for first defendant.

Eber for fifth defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

TERRELL, AG. C. J.—This was an application to vary or discharge the Registrar's Certificate dated the 22nd June, 1937. The certificate was made in pursuance of a Judgment of Prichard, J. in this action dated the 18th September 1934, the material parts of which are as follows:—

> "THE COURT DOTH ADJUDGE that the first and second defendants are jointly and severally liable to make good to the trust estate the sums of $40,000.00, $24,343.31 and $950 as in the pleadings mentioned and that judgment be entered against the first and second defendants for the total sum of $65,293.31 with interest at the rate of eight per cent. per annum with annual rests from the 1st day of June, 1930 and the Court doth Order that the following accounts and enquiries be taken:—
>
> 1. An account by the first and second defendants on the footing of wilful default of all other monies and funds come to their hands or the hands of either of them or any person or persons on their behalf.
> 2. An enquiry what parts if any of the Testatrix's real and personal estate are outstanding or undisposed of.
> 3. An enquiry what real estate the Testatrix was seized of or entitled to at the time of her death."

In pursuance of this Judgment the Registrar made an order on the 12th October, 1934 that the 1st and 2nd defendants were to file their accounts within four weeks and that the Plaintiffs were to file their falsifications and surcharges within three weeks of the filing of the accounts.

Accounts were ultimately filed by the 1st defendant on the 6th December, 1934 and by the 2nd defendant on the 8th March, 1935.

The 1st and 2nd defendants were the trustees of the estate of Elizabeth Surin, deceased, until they were removed by the order of Prichard J. above referred to.

The Plaintiffs never filed any falsifications or surcharges.

On the 6th March, 1937, the second defendant, through his solicitor, made an appointment to proceed with the inquiries, and certain documents were produced by the first defendant's solicitor and retained by the Registrar.

On the 4th May, 1937 the second defendant filed falsifications against the first defendant's accounts and on the 13th May, 1937 the inquiry proceeded. The solicitors for the Plaintiffs and the first defendant were present, but having no instructions were permitted to withdraw, and the only party present at the hearing was the second defendant and his solicitor. At a subsequent hearing the first defendant appeared in person, was cross-examined by the second defendant and the inquiry was concluded.

In schedule II of her account the first defendant had given particulars of two properties, namely, (1) 112 Bencoolen Street and (2) four pieces of land (now 155 Charlton Road) as forming the immovable property to which the testatrix was entitled at the time of her death.

The second defendant was appointed trustee of the estate of Elizabeth Surin, deceased, jointly with the first defendant by deed dated the 30th May,

1930. This deed was not put in evidence before the Registrar, but it is referred to in paragraph 6 of the statement of claim, and it is not disputed that the properties above referred to were specifically mentioned in the deed of appointment. Accordingly the second defendant has since that date been an express trustee of these properties on behalf of the beneficiaries entitled under Elizabeth Surin's will. Nevertheless, in his falsifications the second defendant professed to falsify these two properties and before the Registrar gave evidence to the effect that these properties, which in fact were registered in Elizabeth Surin's name at the date of her death, had never formed part of her estate and really belonged to the estate of her husband Jonathan Surin, deceased.

In my opinion the proceedings before the Registrar were very irregular. The second defendant was never a beneficiary in the estate of Elizabeth Surin. On the contrary, he was an accounting party and a trustee who had been found guilty of a breach of trust. He certainly never obtained an order to falsify, and I doubt whether he was ever in a position in which he could properly apply for such an order.

Quite apart however from these technicalities it is well settled law that a trustee must not set up or aid the adverse title of a third party against his own beneficiaries. (*Underhill*, 8th Edition p. 322). It might have been different if a third party had set up a claim which the trustee believed to be paramount to that of his beneficiaries. But in fact no such claim was ever set up by any of the beneficiaries to the estate of Jonathan Surin, deceased.

An examination of the Record in these proceedings makes it quite clear that the second defendant was not in the least concerned with two rival claimants, and his only object in filing the falsifications was to endeavour to show that there was no property subject to the trust and by this means escape the consequences of his breaches of trust.

In these circumstances I think that the Registrar should not have admitted his falsifications or received evidence which was intended to impeach the title of his own beneficiaries.

I now come to the Registrar's certificate. If the Registrar had refused to admit the falsifications of the first defendant and his evidence impeaching the title of his own beneficiaries, the only evidence before the Registrar would have been that of the first defendant and her accounts which showed that the two properties in question formed part of the estate of Elizabeth Surin, deceased. The Registrar nevertheless found that the properties in question had been purchased with moneys belonging to the estate of Jonathan Surin, deceased, and did not belong to the estate of Elizabeth Surin, deceased. Accordingly he found as to the account No. 3 in the order of Prichard J. that the Testatrix died possessed of no real estate.

For the reasons given above I do not think that this finding could in any event be supported. But in fact the matter is concluded beyond all doubt by the Judgment of Prichard J. above referred to. Without going into the evidence which was called at the trial of the action and which was not before the Registrar on the inquiry, it is of course permissible to examine the record in order to ascertain the meaning and scope of the order from which the Registrar derives his authority.

The order starts by adjudging that the first and second defendants are jointly and severally liable to make good to the trust estate the sum of $40,000, $24,343.31 and $950 as in the pleadings mentioned.

On referring to the statement of claim I find that paragraph 8 reads as follows:—

> "8. Part of the estate of the Testatrix consisted of immovable property in Singapore viz. No. 112 Bencoolen Street and five pieces of land in Serangoon. This property was sold in or about the month of May 1930 for the sum of $40,000."

It is then alleged that about $30,000 out of this sum had been spent in paying the personal debts of the first and second defendants and that the balance was unaccounted for.

The judgment itself commences:—

"This action coming on for trial this day before the Honourable Mr. Justice Herbert William Prichard in the presence of counsel for the Plaintiffs and for the defendants and upon hearing counsel on both sides *The Court doth adjudge, etc.*"

From this it would appear that no evidence was called and that the finding of a breach of trust against the first and second defendants was not opposed. I have however referred to the learned Judge's notes of evidence and find that the first defendant consented to judgment and that the second defendant admitted the breaches of trust. In any case the effect of the judgment is quite clear, namely, that the properties in question had formed part of the estate of Elizabeth Surin, deceased and that the first and second defendants having sold these properties had misapplied the proceeds.

The inquiry directed by the later part of the order can only refer to real estate other than the properties dealt with in the earlier part of the judgment.

The matter therefore is concluded by *res judicata* and the Registrar's certificate cannot accordingly stand.

The Plaintiffs are not interested in any of the other findings of the learned Registrar and therefore I will not deal with them. It will be sufficient if the certificate of the learned Regis-

trar is varied by declaring, as a result of the third inquiry, that at the date of her death the testatrix was entitled to No. 112 Bencoolen Street, Singapore and four pieces of land in Serangoon Road as described in paragraph 6 of the certificate.

The costs of the application, will be reserved for argument before me in chambers.

Order Accordingly.

Solicitors for plaintiff:—*Mendis & Ahlip.*
Solicitors for 1st defendant:—*Sisson & Delay.*
Solicitors for 5th defendant:—*Chan & Eber.*

[ORIGINAL CIVIL JURISDICTION].
TERRELL, Ag. C.J.
October 20, 1937.

IN RE THIO TIAUW SIAT (deceased).

CHANG KAM LONG (an infant)

v.

H. H. BUSFIELD AND ANOTHER.

[SINGAPORE SUIT No. 1068 of 1932]

Estate Duties Ordinance (Cap. 20), s. 23, sub-s. 1 and s. 26.—Estate Duty wrongly paid out of income instead of capital—necessity for adjustment.

A testator bequeathed property to his trustees with directions to distribute the income during a fixed period amongst a number of beneficiaries. When any beneficiary of income should die his share passed to and became divisible amongst the remaining persons entitled to share in such income by way of accretion to their shares in the proportions mentioned in the will. Upon the cesser of the life interest of a beneficiary of income so dying estate duty and interest thereon was paid out of the income of the trust estate and such payments were duly brought into the accounts which were rendered by the trustees and were filed in Court and which were passed by the Registrar in the presence of and without objection by certain of the beneficiaries of income. In view of the judgment in *Syed Hashim bin Kassim deceased,* (1936) S.S.L.R. 152; (1936) 5 M.L.J. 245 it later appeared that the duty ought to have been paid out of the capital from which the life interest which had failed was derived.

Held that the trustees ought now to adjust the payments in accordance with the correct position and to raise the necessary funds from capital under the directions of the Court.

Syed Hashim bin Kassim deceased, (1936) S.S.L.R. 152; (1936) 5 M.L.J. 245 followed.

ADJOURNED SUMMONS.

G. E. N. Oehlers for plaintiff.

Mallal for defendants.

Phillip Hoalim for S. H. Cheah, representative of class of persons entitled to the corpus of the estate.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

TERRELL, AG. C.J.—By his will the testator Thio Tiauw Siat devised and bequeathed his residuary estate to trustees upon trust for the lives of ten named persons. During this time the income, in the events that have happened, was divisible among nine persons. Two of the Beneficiaries received a double share, and the income was accordingly divisible into eleven shares. Two of the beneficiaries have died and by the judgment of this Court dated the 8th November 1933, and made in this suit, it was declared that the shares of income given to the beneficiaries who had died upon their respective deaths passed to and were divisible amongst the remaining persons entitled to share in such income by way of accretion to their shares in the proportions mentioned in the will.

Estate duty became payable in respect of the cesser of the life interests of the deceased beneficiaries, and in May 1936 the duty and interest was paid out of the income of the trust estate. Such payments were duly accounted for in the half yearly accounts filed by the trustees, and such accounts were duly passed in the presence of and without objection by certain of the income beneficiaries.

From the judgment of Clark J. in *Syed Hashim bin Kassim deceased,* (1936) S.S.L.R. 152; (1936) 5 M.L.J. 245 it is clear that the duty ought to have been paid out of the capital from which the life interests that had failed, were derived.

On the present application the trustees ask in effect whether they are entitled to readjust the payment of the duty in accordance with the judgment of Clark J.

It was argued by Mr. Hoalim on behalf of the persons entitled to the corpus, that no adjustment could now be made on the ground that the Registrar's certificate approving of the accounts was final, and on the ground that money paid under a mistake of law could not be recovered.

As regards the Registrar's certificate I do not think that any difficulty arises. The certificate proves that the trustees had paid a certain sum for estate duty, but the question as to the fund from which the payments should have been made was never argued, and the Certificate cannot be regarded as *res judicata* upon this question.

The other argument, that money paid under a mistake of law is irrecoverable, appears to me to be founded upon a misconception of the circumstances. The trustees have not in fact paid anybody except the Commissioner of Estate Duties, and there is no suggestion that such payment was not proper. What the trustees have done is to debit the life interests with a payment which should have been made from corpus. The persons entitled to the corpus have not altered their position as a result of the failure of the trustees to make the payment out of the corpus, and accordingly no question of estoppel arises.

The only case where money paid by trustees has been held to be irrecoverable is when it would be a hardship upon the beneficiaries who have received money in good faith to repay money which they have probably spent. See *in Re Horne,* [1915] 1 Ch. 76. In that case the executors of a trustee who had through carelessness